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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

JACOB MANDEL, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 17-03511-WHO
)	
BOARD OF TRUSTEES OF THE)	
CALIFORNIA STATE UNIVERSITY,)	
SAN FRANCISCO STATE UNIVERSITY,)	
ET AL.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Wednesday, November 8, 2017

TRANSCRIPT OF PROCEEDINGS

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Wednesday - November 8, 2017

2:12 p.m.

P R O C E E D I N G S

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THE CLERK: Calling CV 17-3511, Mandel, et al., vs. Board of Trustees of the California State University, et al. Counsel, please come forward and state your appearance.

MR. PHILLIPS: Good morning, Your Honor. Brad Phillips of Munger, Tolles & Olson on behalf of all defendants except Professor Abdulhadi, and with me at counsel table is my colleague, Adele El-Khoury.

THE COURT: Good afternoon.

MR. HUNTER: Good afternoon, Your Honor. Alan Hunter for Defendant Abdulhadi. I have two colleagues with me.

MR. KLEINMAN: Good afternoon, Your Honor. Mark Kleinman, also for Defendant Abdulhadi.

Mr. Hunter will be arguing the motion to dismiss. I'll be addressing matters of the case management conference.

MR. GHARAGOZLI: Good afternoon, Your Honor. Ben Gharagozli, G-H-A-R-A-G-L-O-Z-I, for Dr. Abdulhadi. I will be handling the motion to strike and the request for judicial notice, if it please the Court.

MR. WEISBURST: Good afternoon. Seth Weisburst, Winston & Strawn, appearing pro bono, along with my colleagues Lowell Jackson, Krista Enns, and from The Lawfare Project, Amanda Berman.

1 **THE COURT:** Welcome to you all.

2 So let me tell you what I understand about this case and
3 the motion to dismiss, and then I look forward to hearing from
4 you.

5 So I understand that the plaintiff agrees that CSU and
6 SFSU can't be defendants on the constitutional claims and the
7 individual defendants can't be liable for damages on those
8 claims in their individual capacity. And the claims that I'm
9 looking at arise from Mayor Barkat's visit and the KYR Fair.

10 And the way that I read the Complaint is that all these
11 allegations -- the allegations harming Jewish students because
12 of their religion, ethnicity, or perceived pro-Israeli
13 beliefs -- are invidious discrimination claims, and so my
14 understanding of the law and of -- particularly of the *OSU*
15 *Student Alliance* case is that the plaintiffs must allege
16 specific intent to discriminate, not just knowledge. And so my
17 analysis of the case flows from that.

18 So with respect to the First Amendment and with respect to
19 the Barkat event, merely because the event space was moved
20 doesn't mean that there is a denial of the right to assembly.
21 The expressed concern of the institution was the expected
22 protest and student disruption rather than the content of his
23 speech. The payment of the fee didn't impinge on First
24 Amendment rights. And it was the protests of third parties and
25 not the acts of the defendants that frustrated the plaintiffs

1 in their ability to enjoy the speech.

2 So those are, I think, problems with the First Amendment
3 claim there.

4 With the KYR Fair, the specific allegations blame the
5 mistaken invitation and the exclusion on the organizers but not
6 the administration defendants. The allegations against Begley,
7 Harris, and Monteiro are a failure to act, and there again,
8 allegations of invidious viewpoint discrimination. And so
9 failing to act is not enough.

10 With respect to equal protection, there's no showing that
11 similar groups in similar circumstances weren't treated the
12 same way with respect to the Barkat event, and with Jews for
13 Peace apparently included at the KYR Fair, equal protection is
14 not -- would not seem to be a claim that would work. And
15 again, with Defendants Stuart, Harris, Piccinotti, there aren't
16 any allegations of affirmative acts there.

17 With respect to Title VI, there aren't allegations of
18 direct discrimination, which I've just been discussing. I
19 think more needs to be alleged than simply the events that have
20 been described regarding Mayor Barkat and the KYR Fair to
21 allege a hostile environment today. You can't rely on what
22 happened between 1973 and, pick a year, 2009. That claim, I
23 think, lacks specificity, nor does it show deliberate
24 indifference.

25 The plaintiffs concede that SFSU investigated the

1 incidents, prepared reports, took steps to address the
2 incidents, and I don't see an actionable denial of educational
3 benefits.

4 So those are the problems with all the defendants, except
5 for the separate motion from Ms. Abdulhadi, and she's not an
6 official actor. She didn't create or apply a policy. There
7 aren't allegations that she acted with specific intent to
8 discriminate against the plaintiffs, and her role, as alleged,
9 seems speculative.

10 So those are my primary concerns. So let's hear from the
11 plaintiffs.

12 **MR. WEISBURST:** Good afternoon, Your Honor.

13 The question before the Court today is whether accepting
14 all the plaintiffs' facts as true, plausible claims for relief,
15 have been stated in the First Amended Complaint.

16 **THE COURT:** Could you start with my primary question,
17 which is invidious discrimination, specific intent. Tell me
18 what the standard is that you think I should be applying, and
19 if I'm misreading the *OSU* case, tell me why.

20 **MR. WEISBURST:** Sure.

21 Plaintiffs' position is that defendants' claims are not
22 based on third-party conduct, but that we've alleged specific
23 conduct by the defendants themselves.

24 We agree with Your Honor that the *OSU* case applies here,
25 and it appears that defendants don't agree or haven't applied

1 the case. According to *OSU*, the conduct the plaintiff must
2 allege to state a Section 1983 claim can be colorable action or
3 inaction, is the first point I would note.

4 Part of the inquiry --

5 **THE COURT:** So my -- the way that I read your
6 Complaint and its -- the allegations are rife throughout it --
7 is that it's an invidious discrimination case, that you are
8 complaining that the Jewish students, because of the fact that
9 they're Jewish, because of their religion, are being treated
10 differently than everybody else. That's invidious
11 discrimination.

12 **MR. WEISBURST:** That's correct. We do allege specific
13 intent, although the *OSU* case, my understanding is that
14 knowledge suffices -- this is from *OSU*. Knowledge suffices for
15 free speech violations under the First and Fourteenth
16 Amendments.

17 So we do allege specific intent, but knowledge alone,
18 according to *OSU*, of the deprivation of plaintiffs' rights is
19 sufficient to state a claim, and per *OSU*, because knowledge
20 suffices, allegations that defendant knew about the violation
21 of the rights and acquiesced in that violation also suffices to
22 state a claim from -- for First and Fourteenth Amendment
23 violations.

24 **THE COURT:** So my problem is that -- yes. You're
25 quoting from part of the case.

1 There's another part of the case that discusses invidious
2 discrimination and the standards that apply, and your case --
3 it's not saying that there is a -- there's some written policy
4 that discriminates against the Jewish students, and the rights
5 that you're complaining about come as a result of invidious
6 discrimination, and that means that you have to allege specific
7 intent, as I understand that case.

8 **MR. WEISBURST:** We believe we have alleged specific
9 intent. I understand Your Honor's point about the historical
10 allegations which are there for, we believe, important
11 background, but I will concede those allegations are not part
12 of the current hostile environment.

13 This is a problem, anti-Semitism at SF State, that's been
14 woven into the culture, and this is decades long, but we
15 certainly do allege that this is a current pervasively hostile
16 environment for Jewish students at SF State, and the specific
17 named defendants are directly involved with this, both
18 regarding the events that are the subject of the 1983 claims,
19 and we do allege -- I can run through them for you, but
20 defendants have tried to cast our Complaint as only focused on
21 those two events, and that certainly isn't the case as far as
22 Title VI.

23 But we do allege specific intent, so our position would be
24 that we have stated a claim. We certainly have provided
25 sufficient factual allegations that reasonable inferences drawn

1 from those allegations would suffice to state a claim,
2 including for invidious discrimination.

3 **THE COURT:** What are your -- give me the top three
4 acts of specific intent that you've alleged.

5 **MR. WEISBURST:** As to the Title VI claim?

6 **THE COURT:** Pick a claim. I'm really looking sort of
7 for the factual guts of the specific intent allegations and
8 what -- and the reason I'm asking is that what I see mostly is
9 what you've alleged as failures to act, failures to do
10 different things, and not a policy, not a specific thing,
11 besides moving the Barkat event. So that's --

12 **MR. WEISBURST:** I understand.

13 **THE COURT:** I'm looking for the heart of your case.

14 **MR. WEISBURST:** As to the Claims 3 and 4, which are
15 the Know Your Rights Fair, it's not accurate that defendants
16 were not involved in the intentional exclusion of Hillel from
17 this Know Your Rights Fair, which was motivated because it was
18 going to affect Jewish students, as we allege, and it denied
19 Jewish students the opportunity to go ironically to this fair
20 which was set up to provide information about rights for
21 vulnerable populations in the wake of the new political climate
22 after the presidential election.

23 So this fair was set up, and for some reason, it was
24 decided that Jewish students weren't entitled to have a table
25 they could go to for their group. You mentioned the JVP group,

1 so I'll address that.

2 First of all, that group is not alleged in our Complaint,
3 and bringing up additional facts such as that we believe is not
4 appropriate at the Rule 12 motion stage. However, to use an
5 analogy, if a group -- if a Chinese group -- a group of Chinese
6 students were excluded because certain people disagreed with
7 policies that the Chinese government was taking, human rights
8 violations, for example, that's obviously invidious
9 discrimination. There is no justification for it. And having
10 a table of some cherry-picked people who will support your
11 point of view and being able to point to them cannot be a way
12 to avoid liability. That's --

13 **THE COURT:** Who's event was it? Wasn't --

14 **MR. WEISBURST:** As we allege, this is a
15 school-sponsored event in the center of campus in the very
16 building that the Barkat event was not allowed to be hosted at,
17 which we do, also on that point, believe that that is a burden,
18 even if it didn't shut down the event entirely in that moment.
19 We believe this is an orchestrated -- and this is what we've
20 alleged -- an orchestrated series of events.

21 First they didn't want to have the event happen in the
22 first place as far as the Barkat event. Then they discussed
23 how to handle it. They decided to move it to a room that far
24 fewer people would attend. People hadn't heard of this space.

25 We do believe the burden of forcing them to pay -- a

1 student group to pay money for an event that otherwise would
2 have been free in the Student Center was a burden, and that was
3 before the standdown order by the school which -- the police,
4 as we allege, were set to act and allow this event to continue.
5 They would have either removed the disrupting students or they
6 could have removed their amplification or their sound. They
7 could have done -- they were in the process of getting ready to
8 do -- to take steps that would have allowed this event to
9 continue, the Barkat speech, and they were ordered by the Dean
10 of Students to tell the police to stand down and take no
11 action, and that had the effect of the entire hour, this speech
12 being shut down using amplifying sound in violation of
13 reasonable time, place, manner restrictions and the school's
14 actual policy until the event ended and nobody could hear from
15 this speech. And everybody who was there was deprived their
16 First Amendment right to hear that speech.

17 And as we allege, which should be taken as true for
18 purposes of this stage of the process, that was done with the
19 intent of discriminating against people because they were
20 Jewish. They were invited by the Jewish group Hillel, and
21 that's the equal protection side of it.

22 As to the Know Your Rights Fair, the school did its own
23 report, as we've alleged, and determined -- we've asked for
24 this report in discovery. We haven't received it yet, but we
25 allege and know that this report finds that Hillel was

1 intentionally excluded, intentionally discriminated against,
2 and --

3 **THE COURT:** By whom?

4 **MR. WEISBURST:** And this was an act of retaliation.

5 This organizing committee, we allege, includes
6 Dr. Abdulhadi. We allege that Dean Begley was involved in this
7 and that these actions were ratified by all the administration
8 defendants, both before and after.

9 Dean Monteiro was aware of it, as we allege, and this
10 can't be just considered something done by students or done by
11 this amorphous committee. We allege the involvement. They
12 were involved.

13 And so given such a clear, both motivation and result, we
14 feel like we've done more than enough to state a plausible
15 claim under the *Iqbal* and *Twombly* cases as far as those two
16 causes of action.

17 As to Title VI, there's so much that we almost -- I'm not
18 sure where to start. We -- we -- I understand the criticism
19 that they've made about the length of our Complaint. In one
20 respect, there's so many unfortunate facts here that we didn't
21 know how to limit it.

22 **THE COURT:** Well, my suggestion is that next time
23 around, you at least get rid of 1973 to 2009. You don't -- you
24 don't --

25 **MR. WEISBURST:** I understand --

1 **THE COURT:** You could say that in a paragraph.

2 The Complaint has some of the read of -- and I understand,
3 but there's -- but it would be more helpful if the Complaint
4 focused on these are the claims and the specific evidence
5 that's going to get me over the hurdle so that I can get the
6 case going.

7 So that is my over-arching suggestion if I stick with my
8 tentative.

9 **MR. WEISBURST:** I understand that. And we -- I won't
10 fight you on that point. We labeled them as background.

11 I can explain just very briefly that this is a systemic
12 institutionalized problem and that those involved have -- there
13 is no way they weren't on notice and aware of these situations,
14 and that makes it all the more problematic that they have taken
15 no steps, and I wanted to point that out.

16 In the beginning, you said that there were investigations
17 done and steps taken. Our position and what we've alleged in
18 the Complaint is that no actual steps have been taken at all
19 that would in any way qualify as a reason why this case
20 shouldn't continue.

21 But I take your point about the historical allegations.
22 We were trying to establish the systemic nature of this issue,
23 but we're more than happy to amend the Complaint and remove
24 those. We're not claiming that that is the precise reason that
25 we're here today. It's about the current pervasively hostile

1 environment for Jewish students on campus where Jews are
2 literally afraid to walk from Point A to Point B on campus.
3 They hide their identity. They can't have a Star of David
4 exposed because they don't know what's going to happen to them.

5 And that takes the form both of physical threats, of
6 statements from the president of the university who has said
7 that physical safety -- he can't agree to the proposition that
8 physical safety of Jewish students is not a political issue and
9 he wouldn't agree to unequivocally welcome Jews on campus who
10 want to be Jews.

11 This is not just a situation of students mistreating each
12 other and an expectation that the administration should police
13 and know of every problem that's happening on campus. This is
14 directly interwoven with the school itself and defendants, and
15 they were involved in not only those events that are the source
16 of our 1983 claims directly and we think it's more than
17 sufficient under *OSU*, but all kinds of other things.

18 Routinely, tabling permits are denied to Jewish students
19 at other events that are lower profile. The Jews wanted to
20 have a mural. There's -- I don't know how many -- 12 or 15
21 other different cultures have a mural represented as part of
22 the Student Center. One of our plaintiffs was part of the
23 Jewish Mural Project that was trying to set up a mural, and the
24 school shut that effort down. That's in our Complaint.

25 Jews are treated like second-class citizens on this

1 campus. It's not just from students. It's from the
2 administration. It's from the defendants. And we feel like
3 we've alleged more than enough as far as the Title VI claim
4 beyond those events, and there's been an effort to try and
5 strike much of this for what we believe doesn't come close to
6 meeting the standard of disfavored motions to strike in the
7 first place.

8 None of this is immaterial or impertinent. The scandalous
9 comments that they're criticizing about coming from Dr. Wong
10 are actual comments and they're scandalous because of their
11 nature. They're not scandalous to include in the Complaint.

12 And we believe that the motions to strike are, whether
13 intentional or not, trying to limit the Complaint so that it is
14 only about these two events.

15 But the fact is it's not, and there is no justification
16 legally to strike the material that they're seeking to strike
17 as far as the motions to strike go.

18 **THE COURT:** All right. And do you want to say
19 anything with respect to Ms. Abdulhadi's motion to dismiss
20 that's different than what you've already said?

21 **MR. WEISBURST:** Yes. Well, we -- let me start here.

22 There's been repeated statements from all corners that
23 this is an effort to silence speech, suppress speech, whether
24 it's Professor Abdulhadi's or anyone else. And we have said it
25 in the Complaint and we mean it and I can say it here today,

1 for what that's worth. This case is not about suppressing
2 other's speech or suppressing academic freedom.

3 It was the speech that the Jewish students and the Jewish
4 plaintiffs showed up to attend. That was the one that was
5 suppressed. That was the speech that didn't get to happen.
6 We're not saying other people's speeches should be shut down.
7 We're saying if Jewish students want to host and attend a
8 speech, then they have a First Amendment right to hear it.

9 And they -- we're just asking for equal treatment from
10 everyone. Dr. Abdulhadi -- all of her motions have over and
11 over again made these accusations that we're trying to silence
12 her speech. Her speech and her opinions are what they are, but
13 they're no more protected by the law than a speech from Jewish
14 students, and there's an established right to hear and receive
15 information that was violated by -- deprived from all the
16 plaintiffs at the Barkat event.

17 And their right to assemble and have -- share information
18 at the Know Your Rights Fair was also taken away from them.
19 Dr. Abdulhadi, we allege, was an organizer of the Know Your
20 Rights Fair. She was involved at all stages of excluding
21 Hillel. It was done with an intentional motivation because it
22 was going to affect Jewish students. That's what we allege.
23 That has to be taken as true for these purposes.

24 Dr. Abdulhadi is more than able at the time -- the right
25 time to deny that, present evidence, answer the claims, but

1 that's not what we're supposed to be deciding here today.

2 She also ratified the conduct. She encouraged the conduct
3 both -- in both events beforehand, ratified it afterwards,
4 staged a hunger strike which extracted a promise from the
5 University to not punish herself, any other faculty, any
6 administrators, any students for their conduct in the
7 unconstitutional deprivation of rights at the Barkat event, and
8 she has come forward in her own written statements and
9 confirmed that this was an intentional exclusion of Hillel to
10 the deprivation of plaintiffs' rights at the Know Your Rights
11 Fair, calling them a privileged white group that didn't belong.

12 And her opinion about whether they belong at a public
13 school's event that ironically is supposed to be informing them
14 of their rights is not something that she can act on as a state
15 actor.

16 She subscribes, as we've alleged --

17 **THE COURT:** Is she a state actor?

18 **MR. WEISBURST:** She is a state actor. She's employed
19 and has authority based on her position, employed by the
20 California State University system. And she has exactly that
21 authority to the harm of plaintiffs.

22 **THE COURT:** All right.

23 **MR. WEISBURST:** I'll just add that as to the Know Your
24 Rights Fair, her own statements confirm what the report also
25 says, which is that this was a purposeful exclusion of

1 plaintiffs' registered student group, unlike the JVP, Jewish
2 Voice for Peace. That is not a registered student
3 organization. That is an outside organization that was allowed
4 to be at this room because they have a litmus test of a
5 position at Bet Israel.

6 Hillel is not an Israeli group. It's a group for Jewish
7 students to unite and be with other Jews and have cultural
8 events on campus, and they were particularly alarmed, as I
9 think it's understandable, anybody following the news in the
10 wake of the presidential election to -- there's been a wave of
11 anti-Semitism in the campaign. There has been a 67 percent
12 increase in anti-Semitic events based on the ADL audit that
13 came out last week.

14 And these students wanted to be able to go to the Cesar
15 Chavez Student Center, like other groups, and hear about -- air
16 their concerns, hear information that would benefit them, and
17 Dr. Abdulhadi and the other defendants were integrally involved
18 in making sure that that didn't happen. And on a public school
19 campus, that is certainly not okay.

20 We do believe she is a state actor, and we've alleged that
21 she is one.

22 **THE COURT:** Thank you very much.

23 **MR. WEISBURST:** You're welcome.

24 **THE COURT:** Mr. Phillips.

25 **MR. PHILLIPS:** Thank you, Your Honor. Brad Phillips

1 on behalf of defendants other than Professor Abdulhadi.

2 Your Honor, I think you focused on exactly the right
3 issues.

4 **THE COURT:** Why didn't you cite *OSU*? There is nothing
5 in -- so I'm just interested in whether I've gone off on a
6 frolic of my own or whether I've got the law right.

7 **MR. PHILLIPS:** No, Your Honor, you haven't gone off on
8 a frolic of your own at all. You're absolutely right. *OSU*
9 requires specific intent with respect -- to the equal
10 protection claim, it requires specific intent by these
11 individual defendants, which is clearly not shown here.

12 With respect to the First Amendment, Your Honor, it
13 doesn't require specific intent there of the individual who was
14 a defendant. It said knowledge by him was sufficient. But you
15 need specific intent in order to have any violation. In other
16 words, you need specific intent by some state actor, some
17 University official of which this other person had knowledge.
18 And they haven't alleged that here either.

19 I think they're right under *OSU* for the First Amendment
20 claim. An individual defendant can be sued for having
21 knowledge of some other official's discrimination under the
22 First Amendment.

23 Under the Equal Protection Clause, the defendant himself
24 or herself has to have that specific intent. But here they
25 haven't alleged either, Your Honor. And I'm happy to go

1 through and detail why we think that's the case.

2 Before I do that, just so I don't forget, I'd like to call
3 Your Honor or command to Your Honor's attention a case that we
4 did not cite in our briefs but which we alerted the other side
5 that we intended to rely on by email on Monday. And that case
6 is *Hernandez vs. City of San Jose*. It's at 241 F.Supp.3d. My
7 original email mistakenly said *second* and counsel nicely
8 corrected me. F.Supp.3d 959. It's Northern District of
9 California, Judge Koh, earlier this year in 2017.

10 The case is pretty much directly on point with respect to
11 the fact that the University did not have an obligation to
12 prevent the protestors from interfering with Mayor Barkat's
13 speech. The case arose out of a Trump demonstration in
14 San Jose during the election campaign, and the protest -- there
15 was a -- they expected protests. The police plan was to direct
16 the protestors in a particular -- direct the demonstrators, the
17 pro-Trump people, in a particular direction.

18 It turned out there was a disruption and some violence and
19 the court clearly held that the University -- that the city did
20 not have any obligation to have stopped that. And the key
21 language, really, is there that Judge Koh says, "Ordinarily
22 members of the public have no constitutional right to sue state
23 actors who fail to protect them from harm inflicted by third
24 parties," and she cites there a Ninth Circuit decision, and
25 then she addresses the exception that was relied on. There are

1 two.

2 State-created danger. And there she said, "To state a
3 claim under the state created danger doctrine, a plaintiff must
4 first allege that the state action affirmatively placed the
5 plaintiff in a position of danger; that is, state action
6 created or exposed an individual to a danger which he or she
7 would not have otherwise faced." Must show that the -- in that
8 case, the police -- here it would be the University and -- put
9 the plaintiff in a worse position than that in which he would
10 have been had the police not acted at all.

11 Those are clearly not the allegations here, Your Honor.
12 And so we think that exception, even if it were advanced, would
13 not apply. I do commend that to your attention, and I
14 apologize for not having cited it in our papers, Your Honor.

15 With respect to the Mayor Barkat event, Your Honor, with
16 respect to the First Amendment claim, it needs to be dismissed
17 for several reasons.

18 First, they haven't alleged sufficiently any significant
19 burden on speech, association, or assembly. The \$300 fee is
20 not a significant burden on their assembly. It was paid.

21 And they don't allege facts that support their conclusory
22 allegation, totally on information and belief, that fewer
23 students attended the event due to the defendants' decision to
24 have it held elsewhere. In fact, they don't identify a single
25 person who didn't attend for that reason, notwithstanding the

1 fact that they affirmatively allege that Plaintiff Mandel spoke
2 with lots of San Francisco State University students about it.
3 They don't identify anyone who claims not to have attended
4 because of that.

5 Your Honor, the allegations of the Complaint themselves
6 establish that it wasn't moved for a discriminatory purpose. I
7 think as Your Honor alluded, they allege that -- they notified
8 the University of it nine days before the event was supposed to
9 take place. And they affirmatively allege at page 62 that the
10 University knew that a protest and likely an unlawful one was a
11 near certain eventuality.

12 And then they allege that Hillel expressly warned the
13 administration of an extreme likelihood of a raucous and
14 potentially violent disruption. That's in paragraph 115.

15 Your Honor, those -- and there are no allegations, no --
16 other than a conclusory allegation, there are no allegations
17 whatsoever of anything any University person said or did that
18 indicated that it was moved for some reason other than the
19 reason explained in the Complaint. The Dean of Students
20 expressed concern about the use of classroom space. Defendant
21 Birello is expressly alleged to have said, "Good luck. We hope
22 there is a great turnout."

23 Defendants communicated, paragraph 67, that they didn't
24 want the Barkat event to occur on the main campus, and
25 Defendant Hong, the Vice-President for Student Affairs, is

1 quoted in the Complaint as being worried about the fact that
2 there were powder kegs all over campus in search of a lit fuse.

3 Defendant Begley is quoted as saying, "If this may draw
4 protest activity, I'm concerned about reserving classroom
5 space. During the middle of the day, we may direct them to
6 Seven Hills or another location that would have less impact on
7 classes in that area."

8 Those are the allegations of the Complaint, Your Honor.
9 The law is clear under the *Pinard* case that is cited in the
10 papers that schools have a right and ability to take action
11 with respect even to protected speech if it will substantially
12 interfere with the work of the school.

13 I acknowledge that colleagues and universities probably
14 have somewhat less leeway in that regard than K through 12
15 schools do, but here you have the plaintiffs telling the
16 University of an extreme likelihood of a violent disruption,
17 and that in that circumstance, clearly the University, on the
18 face of the Complaint, had the discretion to have it moved on
19 campus but at a site farther from the center of campus.

20 I have addressed their argument, Your Honor. So that goes
21 to why it was moved.

22 With respect to the fact that the University didn't
23 intervene during the protest, I've addressed that. I think the
24 *Hernandez* case is pretty much squarely on point. The fact that
25 somebody may have violated University policies or the like is

1 irrelevant to the First Amendment claim. You can't make a
2 First Amendment claim based on the fact that somebody may have
3 violated a campus policy or a university policy, Your Honor.

4 And they also -- they make reference to a heckler's veto,
5 sort of a passing reference to a heckler's veto, but as I
6 expect Your Honor knows, a heckler's veto is where the
7 government removes the speaker, not where there is a protest
8 that the heckler's shouting down. It's where the government
9 decides that instead of doing anything about the protestors,
10 they remove the speaker and keep him from speaking, which is
11 not what happened here.

12 On the equal protection claim, clearly they need to show
13 both that others in similar circumstances were treated
14 differently. There is not even an allegation of any --

15 **THE COURT:** I don't need to hear argument on this.

16 **MR. PHILLIPS:** Thank you, Your Honor.

17 With respect to the Know Your Rights Fair, Your Honor, the
18 Complaint does not allege that these defendants were involved
19 in the decision to move the fair, Your Honor, other than in a
20 totally conclusory fashion.

21 They allege that the organizing committee, which is later
22 alleged in a quotation from *J Weekly*, but nevertheless, in the
23 Complaint alleged to be the self-organized and self-appointed
24 planning committee -- that that committee cut off registration
25 at a particular time, excluding the other groups, as well as

1 Hillel. But that they cut off registration.

2 And it expressly alleges that Monteiro, learning of that
3 decision, decided he wouldn't speak -- be the keynote speaker
4 for the event.

5 And the Dean of Students, Begley, told them that he
6 thought excluding Hillel was a problem. And some allegation
7 that any of the other administrator defendants even knew about
8 it.

9 So there is clearly no showing that the administrator
10 defendants made the decision or ratified the decision not to
11 include them, in addition to the fact, Your Honor, that it's
12 not shown that Hillel was excluded because of race, religion,
13 or viewpoint.

14 And they try and say well, it doesn't matter that another
15 Jewish group had a table. And I don't know much about the
16 other group, Your Honor, so I can't address counsel's
17 representations in that regard with respect to viewpoint.

18 And they suggest that this is -- in their papers --
19 frankly, I think somewhat offensively suggest that it's -- some
20 of my friends are -- some of my friends are Jewish defense,
21 citing *People vs. Johnson*, the California Supreme Court's
22 peremptory challenge case, Your Honor.

23 It's not that at all, Your Honor. In *People vs. Johnson*,
24 the prosecutor struck all the Jewish prospective jurors and
25 said he had friends that were Jewish, and not surprisingly, the

1 court didn't think that was a good enough explanation.

2 The analogy to here, Your Honor, there would be if there
3 were two prospective Jewish jurors and the prosecutor struck
4 one and left the other one on the jury, that would be a decent
5 argument by a prosecutor defending his decision as to why he
6 struck that juror, and that's the situation here, Your Honor.

7 With respect to the Title VI claim, Your Honor, I do
8 disavow all the historical allegations.

9 All of the other stuff, other than the Mayor Barkat event
10 and the Know Your Rights Fair, Your Honor, is all just sort of
11 thrown up against the wall. There is no allegations, specific
12 allegations, about when it was reported, to whom it was
13 reported, was that a person with authority to deal with the
14 situation, what did the University do after that and so on.
15 None of that. It's all just throwing up a bunch of general
16 allegations and saying that it's a hostile environment, and
17 that's not how Title VI cases needed -- need to be pleaded, as
18 with Title IX cases with which I know that Your Honor is also
19 very familiar with.

20 And the perhaps most fundamental, Your Honor, there's
21 absolutely no showing of deliberate indifference. The
22 Complaint on its face refutes a deliberate indifference claim.

23 It may well be the case, I think it is the case, that the
24 University hasn't done everything that the plaintiffs and some
25 others would like them to do. And I will say, as the Complaint

1 itself alleges, the University is working on the problem.

2 But under the law, Your Honor, the fact that the
3 University conducted investigations, concluded the violations
4 occurred, condemned some of those, talked about them with the
5 alleged perpetrators, all of those allegations, Your Honor, are
6 crystal clear that they refute any showing of deliberate
7 indifference under the law which requires a conscious decision
8 by the University simply not to address the problem, which is
9 totally refuted by the Complaint itself.

10 And I will say as an aside, I think some of the
11 characterizations about -- by counsel today about the
12 University's conduct are inaccurate, but I don't think they're
13 really relevant to the motions before them.

14 And, Your Honor, with respect to the -- whether there's a
15 showing of discrimination that was severe, pervasive, and
16 objectively offensive, Your Honor, the statements of the
17 protestors are not -- those -- those statements may have
18 been -- some of them may have been offensive, but that's not --
19 first of all, most of them, if not all of them -- probably all
20 of them, Your Honor -- the ones that are quoted in paragraph
21 72, which I will agree some of which are offensive, highly
22 offensive, are all protected under the First Amendment.

23 And I would note, Your Honor, that they say that the --
24 the "get the F off campus" is directed at the students there.
25 I would submit that a better inference is probably that it was

1 directed at the Mayor of Jerusalem whose speech they were --
2 presence on campus they were protesting.

3 But I think those statements are all directed at Israel
4 and Israeli policy and the mayor's policy and so on. They are
5 not directed at people because they're Jewish. There is a
6 difference between those two things, as the amicus brief that
7 was submitted suggests.

8 With respect to the Know Your Rights Fair, clearly being
9 excluded from one fair on campus organized by groups with which
10 Hillel is clearly hostile, I think it goes both ways, I expect.
11 Clearly not a severe form of violation of their rights, a
12 single fair, a table.

13 So, Your Honor unless Your Honor has other questions, I
14 will submit it.

15 **THE COURT:** Thank you, Mr. Phillips.

16 Let's hear from Professor Abdulhadi.

17 **MR. HUNTER:** Alan Hunter for Defendant Abdulhadi. I
18 will try and be brief and non-repetitive of Mr. Phillips,
19 Your Honor.

20 What I would actually like to start with is focusing on
21 what really are the charging allegations relative to Professor
22 Abdulhadi.

23 We heard from plaintiffs' counsel some statement to the
24 effect that she was an organizer relative to a particular
25 event. That doesn't appear on the face of the First Amended

1 Complaint.

2 When we get right down to the heart of it, their charging
3 allegations against Professor Abdulhadi is that in her role as
4 a faculty adviser, she failed to assist GUPS, which is -- or
5 GUPS, which is a non-state acting members group relative to
6 compliance with University nondiscrimination policy.

7 So that brings us right to the question of whether or not
8 there's a constitutional violation relative to the professor.
9 And with respect to the *Citizens* case, we know that merely any
10 action taken to avoid a third-party non-state actor from
11 violating plaintiffs' constitutional rights is not actionable.

12 The cases the plaintiffs cite on that point are all
13 employment-related cases where it's a supervisor, not -- and
14 Professor Abdulhadi is not a supervisor. But it's a supervisor
15 supervising another state actor. That's not the situation we
16 have here.

17 With respect to the *Hernandez* case that Mr. Phillips
18 addressed, that is important. The state-created danger
19 exception rule is of no application here. And in particular,
20 I'll just point out that, one, there is no facts that show that
21 Defendant Abdulhadi -- Abdulhadi's part in this case put
22 plaintiffs in a worse position than they would have been
23 otherwise.

24 There's no facts of deliberate indifference on the
25 professor's part, in particular with respect to no facts of

1 deliberate indifference as to any state-created danger that was
2 obvious or known to the professor. And there's no alleged
3 facts regarding intent on the part of the professor.

4 That brings us to qualified immunity with respect to the
5 professor, the first element of which is is there is a
6 constitutional violation. I've already gone over that, but if
7 we go to the next element, which is is there a -- is it
8 sufficiently clear that a reasonable official would understand
9 what he or she is doing violates a constitutional right.

10 What we're dealing with here is -- and what that
11 translates to -- is a reasonable position -- is a reasonable
12 person in the position of a faculty adviser who has the
13 obligation to assist, not to control, but to assist a
14 third-party student group, can they be fairly expected to have
15 a sufficiently clear understanding that if they fail to assist,
16 as alleged, that that somehow constitutes a constitutional
17 violation. So our position is that it does not, and the
18 professor is entitled to qualified immunity.

19 On the immunity spectrum, there is also the Eleventh
20 Amendment, and what we've heard -- and Mr. Phillips actually
21 stressed it in part -- we're dealing with past events, two
22 distinct events with respect to the professor of failure to
23 assist relative to two particular events.

24 There's no allegation of ongoing continuous misconduct on
25 the part of the professor. So in the context of official

1 capacity claims, there is -- the Eleventh Amendment defense
2 does apply.

3 Of interest -- and I would draw the Court's attention to
4 the First Amended Complaint at page 17, lines 18 through 27.
5 The plaintiffs in that -- in that part of the Complaint are
6 conceding that the lead charging allegations against the
7 professor are official capacity claims, not individual capacity
8 claims, and therefore nothing survives the Eleventh Amendment.

9 And on the dec relief claim, I would simply point out that
10 there are no factual allegations that establish any real link
11 between the professor and any damage suffered by the
12 plaintiffs, let alone any damage that's not speculative.

13 And then in closing, I would simply note in reference to
14 one of Your Honor's comments, is the professor a state actor or
15 not? For some purposes, maybe yes; for other purposes, maybe
16 not. And as an example of that, plaintiffs' counsel indicated
17 that the professor was quoted in an after-the-fact article
18 about one of the events. That doesn't necessarily put her in a
19 state actor role in that context.

20 So with that, if you have -- with respect to the motion to
21 strike, I'll defer to Mr. Gharagozli.

22 **THE COURT:** All right. Thank you.

23 Any last words?

24 **MR. WEISBURST:** Yes, please. Thank you, Your Honor.
25 There's quite a bit to respond to. I will try and be brief.

1 **THE COURT:** You don't need to repeat anything that
2 you've said before.

3 **MR. WEISBURST:** I understand.

4 **THE COURT:** Be very targeted.

5 **MR. WEISBURST:** We've argued these points in our
6 brief, and I will refer you to them.

7 I want to stress that, as you know, as the Court knows,
8 what we allege matters, so to the extent -- there's all kinds
9 of things in counsel's argument about -- that was just
10 disputing facts, and what the Complaint alleges must be taken
11 as true.

12 Specifically as one example, Dr. Abdulhadi's counsel said
13 that we don't allege that Dr. Abdulhadi is an organizer of the
14 Know Your Rights Fair. Paragraph 160 says, "Abdulhadi wrote
15 that because the organizers there challenged the status quo,
16 student and faculty organizers, including on information and
17 belief herself, had been subjected to systematic interrogation,
18 harassment and administrative retaliation by the University."
19 That is not Abdulhadi being quoted in an article, as counsel
20 said. That's an article that she herself wrote. So that
21 allegation is in there.

22 And also as far as the several things that the
23 administration defendants' counsel said, he's disputing facts
24 and making several statements about things that we haven't
25 alleged that actually are in the Complaint, so I guess -- I

1 have a chart that -- if it would be helpful for the Court that
2 tracks the allegations by defendant. Maybe that would be a
3 helpful submission.

4 **THE COURT:** No, that wouldn't. A shorter, plainer
5 statement of the claim would be a helpful submission, actually.

6 There used to be a rule, which is now honored in the
7 breach, of requiring a short and plain statement, and now you
8 can't because of *Iqbal*, and I'm not suggesting that you leave
9 out things that are important to your case, but I am suggesting
10 that you'll want to focus on those.

11 And rest assured that before the -- my order on the motion
12 comes out, it will be cited to the allegations in the Complaint
13 so you don't have to go through all the things that -- where
14 you disagree with a fact that one of the counsel said.

15 **MR. WEISBURST:** I understand. Thank you, Your Honor.
16 And we haven't yet raised leave to amend, but --

17 **THE COURT:** I'm going to give you leave to amend.

18 **MR. WEISBURST:** Okay. Thank you, Your Honor.

19 I won't repeat anything more than necessary.

20 We agree with Your Honor that *OSU* and the *Dubner* case
21 apply here. The *Hernandez* case that counsel cited and which is
22 a progeny of *DeShaney* do not apply here. Those are substantive
23 due process claim cases. This is not a substantive due process
24 case.

25 While we do allege it was dangerous in that room, the 1983

1 claims are about First and Fourteenth Amendment rights.
2 *DeShaney, Hernandez*, those are not about the First Amendment.
3 They're about a substantive due process claim related to bodily
4 integrity and physical danger. So those cases simply do not
5 apply here.

6 And *OSU* and *Dubner* do, which is another Ninth Circuit case
7 that said that to address the point about supervisors having --
8 trying to get out of the realm of *OSU* because people might not
9 have control over the others, the *Dubner* case, cited in our
10 opposition, holds that a Section 1983 defendant can, quote, "be
11 held liable in his individual capacity if he knowingly refused
12 to terminate a series of acts by others which he knew or
13 reasonably should have known would cause others to inflict a
14 constitutional injury." That's not restricted by one state
15 actor to another, supervisor or otherwise. That squarely
16 applies to Dr. Abdulhadi and every other defendant that had
17 control of another defendant.

18 So to the extent that President Wong has control over Dean
19 Begley, who is giving the standdown order, that applies all the
20 way down to the people that are managing these events.

21 So we have alleged the conduct that would be -- that would
22 fall under that that in the very least, people knowingly
23 refused to terminate a series of acts by others and then
24 ratified them after the fact.

25 There was a statement made about -- this is just an

1 important one with Title VI that reports that complaints
2 weren't made. We haven't alleged that. We allege that reports
3 under an Executive Order 1097 were specifically ignored,
4 including by plaintiff Jake Mandel, who is in the courtroom
5 here today. He filed one related to the Barkat event and he
6 filed one after when he was physically threatened on campus.
7 Those were ignored. This is all in the Complaint.

8 We allege that the investigator of the Barkat event
9 specifically cited that she thought it was strange and a
10 problem that nobody had given her these reports that had not
11 been followed up on, and she had to repeatedly follow up and
12 eventually she found out about them.

13 So part of our Title VI claim is the framework for
14 complaints about harassment and mistreatment on campus, but
15 when somebody actually fills out the complaint, nothing is done
16 about it, and that's in our Complaint. That a hundred percent
17 supports a hostile environment claim under Title VI and
18 deliberate indifference.

19 I mean, the idea that we haven't alleged deliberate
20 indifference when we talk about the specific comments and
21 conduct of the defendants and the administrators at the school
22 in light of everything that's happened, it's absolutely the
23 definition of deliberate indifference, what's happening on this
24 campus.

25 Again, counsel was alleging that the Complaint somehow

1 concedes something has been done, that actions have been taken.
2 Nothing could be further from the truth. No meaningful actions
3 in any way have addressed any of these issues.

4 Qualified immunity, it's usually not handled at this stage
5 on Rule 12, as Your Honor knows. Where there is a
6 clearly-established right that somebody reasonably should have
7 been aware that's it's being violated, you're not entitled to
8 qualified immunity. That's clear in the case law.

9 These are First Amendment rights here. The right to
10 listen and receive information is an established part, just
11 like the right to speech and to assemble and associate. There
12 can be no possible claim that these -- the conduct, as we've
13 alleged it, which is what matters here, is something that isn't
14 clearly established or that somebody wouldn't have been on
15 notice would have been a violation of a clearly-established
16 right.

17 I think this is the last thing. The Eleventh Amendment,
18 something Your Honor said at the beginning -- I just want to
19 make sure we're all on the same page. We seek damages from
20 defendants in their personal capacity and injunctive relief in
21 their official capacity. We do allege this is an ongoing
22 problem. We do allege that injunctive relief is absolutely
23 necessary. We have not conceded in any way this is limited to
24 one person's official or personal capacity, and for each
25 defendant we do explain their own personal conduct that goes to

1 these claims, so I just wanted to respond to that point from
2 counsel as well.

3 **THE COURT:** All right. Thank you. And I really
4 don't --

5 **MR. PHILLIPS:** Two, quickly.

6 **THE COURT:** If it takes less than a minute,
7 Mr. Phillips.

8 **MR. PHILLIPS:** Your Honor, I know you're going to give
9 them leave to amend, but if he says what they allege matters,
10 then the Complaint should be dismissed with prejudice --

11 **THE COURT:** I don't need to hear anything more. Thank
12 you.

13 **MR. PHILLIPS:** The other point --

14 **THE COURT:** Thank you, Mr. Phillips. You used up your
15 points.

16 All right. So what I'm going to do is almost undoubtedly
17 I'm going to dismiss the Complaint with leave to amend, and I
18 would start honing the Complaint so that it is really a lean
19 and clear piece of advocacy. And so the motion to strike is
20 moot.

21 And with respect to the CMC, I'm going to put that over to
22 the next hearing on the motion to dismiss. And I saw the
23 plaintiffs' schedule and the concern that the trial occur by
24 February of 2019 because of the fear of the -- I guess the
25 statute running with respect to some of the acts, at least with

1 respect to Title VI, and I will keep that in mind. I assume
2 that that means sometime before the graduation in the spring of
3 2019, and I will keep that in mind when we come to setting the
4 schedule. But I want to see what claims are there after a
5 well-honed Complaint. So that's that.

6 And I'll look forward to seeing you again. Thank you.

7 (Proceedings adjourned at 3:08 p.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, November 9, 2017

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter